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In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
PETITIONERS

v.

JERALDINE SCOFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

As explained in the petition, this case presents two questions of exceptional importance to civil litigants. The first is whether, when a trial court finds that a verdict has been tainted by a jury's passion or prejudice, due process requires the court to grant a new trial instead of remittitur. The second is whether, and in what circumstances, a trial court violates due process when it awards a substantial amount in compensatory damages but nevertheless proceeds to award an even greater amount in punitive damages.

In their brief in opposition, respondents largely avoid confronting the significant divisions of authority in the lower courts on those questions. Instead, respondents devote much of their brief to a heavily slanted and entirely unsourced rendition of the facts. To the extent

respondents proceed to address the questions presented, they primarily contend that the first question is not properly before this Court and that the conflict of authority on the second question is fact-bound and therefore does not warrant the Court's review. Respondents are incorrect in each respect. In actuality, this case presents an especially suitable vehicle in which to provide much-needed guidance to the lower courts on both questions. The petition for certiorari should therefore be granted.

A. This Court Should Grant Review To Decide Whether The Only Appropriate Remedy For A Verdict Resulting From A Jury's Passion Or Prejudice Is A New Trial

1. With regard to the passion-or-prejudice question, respondents do not dispute that, since this Court's decision in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin*, 283 U.S. 520 (1931), most federal courts of appeals and numerous state courts of last resort have held that the only appropriate remedy for a verdict resulting from a jury's passion or prejudice is a new trial—with only a few courts holding to the contrary. See Pet. 11-14. Respondents instead merely contend (Br. in Opp. 19-21) that no court has squarely held that such a rule is required *as a matter of due process*. That contention lacks merit.

To be sure, in *Moquin* itself, this Court did not expressly ground the rule it was adopting in due process—although, in proposing that rule, the petitioner in *Moquin* cited due process as its basis. See Pet. Br. at 12-13, *Moquin*, *supra* (No. 543). Contrary to respondents' contention (Br. in Opp. 19-21), however, lower courts have generally understood the rule of *Moquin* not to be confined to the context of the particular federal statute that supplied the cause of action, but rather to reflect a gen-

erally applicable constitutional principle.[1] For example, numerous state-court decisions have relied on *Moquin* in requiring a new trial—reliance that would make little sense unless the rule of *Moquin* were rooted in an incorporated principle of federal constitutional law. See, *e.g.*, *Hash* v. *Hogan*, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Higgs* v. *District Court*, 713 P.2d 840, 861 (Colo. 1985); *Stokes* v. *Wabash R.R.*, 197 S.W.2d 304, 309 (Mo. 1946).[2]

But to the extent there is any lingering uncertainty about the basis for the *Moquin* rule, that uncertainty provides an additional reason for granting review here, not a reason for denying it. See PLAC Br. 6-7. As explained in the petition (at 14-15) and in PLAC's amicus brief (at 12-15), the better view is that due process is violated when a verdict is "the product of bias or passion," *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989), and that remittitur is an inadequate remedy for such a violation because of the risk that the jury's bias "may have infected the decision of the jury on liability, as well as damages," 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2865, at 165 (2d ed. 1995).

Respondents do not directly take issue with those propositions. Instead, they merely contend (Br. in Opp.

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[1] Members of this Court have also understood *Moquin* in that manner. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (plurality opinion) (citing *Moquin* for the "general rule" that "a verdict based on jury prejudice cannot be sustained").

[2] Respondents contend (Br. in Opp. 20) that, "[i]n some of the cited cases, state law simply required the application of such a rule." In the only case respondents cite for that proposition, however, the court relied entirely on *federal* cases, which in turn cited *Moquin*. See *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992).

23) that "[r]emittitur as a remedy for excessive damages dates back to the English common law." But contrary to respondents' suggestion (Br. in Opp. 25), applying the *Moquin* rule here would not require this Court to "supplant[]" remittitur in the circumstances in which it is traditionally used: *viz.*, where the damages awarded are merely excessive (and a court need only determine the amount the jury could validly have awarded based on the evidence). See Pet. 11; PLAC Br. 15-19. Indeed, respondents do not identify a single jurisdiction in which adoption of the *Moquin* rule has extinguished the practice of remittitur. The Nevada Supreme Court therefore erred when it held, despite its recognition that passion and prejudice had infected the verdict, that remittitur "spared" the verdict without the need for a new trial. See Pet. App. 43a.

2. In the alternative, respondents contend at length (Br. in Opp. 10-19, 21-23) that the passion-or-prejudice question is not properly before the Court in the first place. That contention is flawed.

a. Respondents first suggest (Br. in Opp. 10-13) that petitioners invited the trial court's error by requesting that the trial court grant remittitur. But as respondents concede (Br. in Opp. 13), petitioners sought remittitur only as an *alternative* to a new trial. As soon as it became clear that the jury's initial damages award contained a sizable punitive component, petitioners moved for a mistrial on the ground that the jury's premature, uninstructed determination of punishment had tainted its verdict. See Pet. Nev. S. Ct. App. 7889-7893. And after the jury was reinstructed and returned a substantially identical award, petitioners moved for a new trial on the ground that the misconduct culminating in the jury's award had "deprived [petitioners] of substantial rights, including [their] rights to due process * * *

under the * * * United States Constitution[]." *Id.* at 7116-7117. Petitioners sought remittitur only in the alternative; although petitioners phrased that request in terms of "passion and/or prejudice" (consistent with Nevada law), it is clear that petitioners were seeking remittitur in the traditional sense: *i.e.*, a determination that the damages award was excessive and "unsupported by the evidence." *Id.* at 7128-7129. That request for remittitur was therefore conceptually discrete from petitioners' contention that the correct remedy for the tainted verdict was a new trial. Because petitioners have consistently sought a new trial as the remedy for the tainted verdict, the invited-error doctrine is inapplicable here.

b. Respondents next contend (Br. in Opp. 13-19) that the passion-or-prejudice question was not pressed in, or passed upon by, the Nevada Supreme Court. That contention, too, is mistaken. Before that court, petitioners repeatedly contended that, in light of the trial court's finding that the jury's verdict had been infected by passion and prejudice, a new trial—and *only* a new trial—was the appropriate remedy as a matter of due process:

> As the trial court eventually acknowledged, the jury's "passion and prejudice" affected both the compensatory and punitive awards. But the court's solution—remittitur rather than a new trial—was patently inadequate to correct the legal and constitutional errors in the verdict[.]

Pet. Nev. S. Ct. Br. 2-3; see *id.* at 3 (contending that the failure to grant a new trial violated petitioners' "rights to due process and a fair trial"); *id.* at 25-26 (arguing that "this case involves violations of [petitioners'] basic rights to due process and a fair trial, a jury deliberately incited by [respondents'] counsel and acting with passion and prejudice, and a premature determination of [petition-

ers'] punishment, which the jury adhered to in its subsequent deliberations").[3] Indeed, in their own brief, respondents addressed, and attempted to rebut, that very argument. See, *e.g.*, Resp. Nev. S. Ct. Br. 17 (addressing petitioners' "claim of passion-induced verdict" under argument heading that petitioners "fail[ed] to establish that the trial court's remittitur [was] inappropriate"). Petitioners therefore did more than enough to satisfy the requirements for preservation of an error of federal law in a case arising from state court. See 28 U.S.C. 1257(a).

Because petitioners clearly pressed the argument before the Nevada Supreme Court that the only appropriate remedy for a verdict resulting from passion or prejudice is a new trial, it is not necessary that the court have actually passed upon that argument. See, *e.g.*, *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). But the Nevada Supreme Court in any event did so when it held that remittitur of the damages award was an appropriate remedy that "spared" the jury's verdict, notwithstanding its determination that the verdict had resulted from passion and prejudice. See Pet. App. 43a. To the extent that the court's treatment was cursory, petitioners can hardly be faulted for the court's failure to address the argument in greater detail. Because the passion-or-prejudice question was pressed in, and passed upon by, the Nevada Supreme Court, there is no obstacle to this Court's granting review on the question here.

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[3] To the extent petitioners again sought remittitur as an alternative to a new trial, they did so only much later in their brief—and after reiterating that the "only appropriate action under the circumstances" was to order a new trial. Br. in Opp. App. 4a (quoting Pet. Nev. S. Ct. Br. 41).

c. Finally as to the passion-or-prejudice question, respondents contend (Br. in Opp. 21-23) that this case presents a poor vehicle for consideration of the question because the lower courts did not specifically find that passion or prejudice had infected the jury's decision on liability. It is clear, however, that the lower courts did find that passion and prejudice had infected the jury's verdict more generally—and that is all that is required to trigger the *Moquin* rule.[4] The trial court not only found that the "totality of the circumstances indicate that the amounts of the verdicts suggest they were the result of passion and prejudice," Pet. App. 51a (internal quotation marks and citation omitted); it also specifically found that "[i]t appears that the jury's feelings regarding punitive damages impacted its award of compensatory damages," which would be "flagrantly improper." *Id.* at 46a-47a (citation omitted). Based on those findings, the Nevada Supreme Court stated without qualification that "the premature jury deliberations on punitive damages had significantly tainted the jury's verdicts as being the result of passion and prejudice." *Id.* at 43a.

Notably, respondents do not, because they cannot, dispute the proposition that passion and prejudice did in fact infect the jury's verdict. There can be no serious doubt that, in disregard of the trial court's instructions, the jury improperly considered punitive damages at the same time it was considering liability—thereby creating

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[4] To trigger the *Moquin* rule, it is not necessary that a court specifically find that passion or prejudice actually infected the jury's decision on liability—a finding that would be "virtually impossible" to make. *Higgs*, 713 P.2d at 861; see *Moquin*, 283 U.S. at 521 (holding that "no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added).

a substantial risk that the jury's liability determination was itself compromised. See Pet. 6-7. And there can be no serious doubt that the jury improperly considered punitive damages not by "mistake[]," Br. in Opp. 7, but because it had been goaded to do so through a series of inflammatory statements made by respondents' counsel, see Pet. 5-6—statements that respondents do not even attempt to defend. Because the lower courts expressly found that passion and prejudice had infected the jury's verdict in this case, and because those findings were plainly correct, this case is an ideal vehicle for the Court to resolve the conflict among the lower courts and hold that, in the event of passion or prejudice, due process compels a new trial.

B. This Court Should Grant Review To Decide Whether The Remitted Punitive Damages Are Constitutionally Excessive

1. With regard to the punitive-damages question, respondents do not dispute that lower courts have taken divergent approaches as to what constitutes a permissible damages ratio in cases involving substantial compensatory awards. As respondents note (Br. in Opp. 26), this Court has generally stated that it is "reluctant to identify concrete constitutional limits on the ratio" of punitive to compensatory damages. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003). At the same time, however, the Court has specifically stated that, "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Ibid.* Only three years ago, the Court reiterated the latter principle as a "constitutional upper limit" and a "due process standard[] that every award must pass." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 501, 514 (2008). Although respondents correctly observe (Br.

in Opp. 27) that *Exxon Shipping* arose in the context of federal maritime law, it is beyond dispute that, in discussing *State Farm* in *Exxon Shipping* (and in *State Farm* itself), the Court was addressing the *constitutional* limits on punitive awards.

To be sure, there is some tension between the Court's general reluctance to adopt hard-and-fast limits on the ratio and its suggestion that there may be "constitutional upper limit[s]" in cases involving "substantial" compensatory awards. But that is precisely the tension with which lower courts have struggled in the eight years since the Court's decision in *State Farm*. Respondents attempt to brush aside the disarray in the lower courts by contending that courts applying a 1:1 ratio in cases involving "substantial" compensatory awards have done so only after "examin[ing] the specific facts and circumstances." Br. in Opp. 31. But respondents overlook that those courts have concluded that the 1:1 ratio operated *as a matter of law* to limit punitive awards, whereas other courts have held that a 1:1 ratio is not legally required even where the award of compensatory damages was concededly "substantial." See Pet. 19-21. The Court's review is desperately needed to clarify the correct approach in these cases, so that the mere happenstance of where suit is brought does not dictate the permissible size of the punitive award.

2. Respondents' other reasons for denying review on the punitive-damages question are insubstantial.

As a preliminary matter, respondents suggest (Br. in Opp. 28-29) that, because the ratio of punitive to compensatory damages in this case is 1.56:1, there is "hardly a difference sufficient to warrant this Court's consideration." But respondents do not dispute that the compensatory damages in this case were substantial (and indeed, far higher than in any other case in which the

Court has had the opportunity to consider the question, see Pet. 30-31). And where the compensatory damages are already so large in absolute terms, even small differences in the ratio make a big difference: here, more than $12 million if a 1:1 ratio were applied instead.

Respondents contend (Br. in Opp. 29) that reviewing this case "would encourage every defendant" subjected to punitive damages to seek certiorari "whenever punitive damages do not strictly conform to their preferred ratio limit." If anything, it is the disarray in the lower courts that is already generating a steady stream of petitions for certiorari. See Pet. 30-31. The Court's review in this case would provide much-needed clarity on the circumstances under which punitive damages are excessive—and thereby reduce, not increase, the number of requests for further review.

Finally, respondents assert (Br. in Opp. 29) that petitioners are seeking "an absolute dollar threshold that would trigger the imposition of a strict 1:1 ratio." As explained at length in the petition (at 24-29), however, the Court need not adopt a categorical bright-line rule in order to reverse the punitive award in this case. Respondents do not dispute that, because (as the trial court noted) the "great bulk" of the compensatory damages in this case "were for pain, suffering and emotional distress," Pet. App. 46a, the punitive award in this case "likely * * * duplicated" substantial aspects of the compensatory award. Pet. 24-25 (quoting *State Farm*, 538 U.S. at 426). Nor do respondents dispute that the other guideposts established by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), confirm that the punitive award in this case was grossly excessive and arbitrary. With regard to reprehensibility, respondents make no effort to defend their reliance below on alleged conduct by petitioners that was uncon-

nected either to the individual plaintiffs or to the State of Nevada. See Pet. 27-28. And with regard to comparable penalties, respondents make no effort to defend the trial court's exclusive reliance on a recent federal penalty against another company for unspecified conduct. See Pet. 28-29.[5]

In sum, this is the paradigmatic case in which a punitive award that is significantly larger than an already substantial compensatory award is inappropriate. The Court should grant review on both questions presented and reverse the manifestly unfair outcome in this case.

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[5] Respondents contend at length (Br. in Opp. 31-34) that compliance with relevant FDA requirements does not categorically bar the availability of punitive damages. But petitioners have argued only that compliance with FDA requirements constitutes compelling evidence weighing against a determination of reprehensibility—and respondents fail to address any of the cases cited in the petition for that proposition. See Pet. 26-27.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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